Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

$165,524.78 (Samuel Richard Mares), *Petitioner*,

v.

THE STATE OF TEXAS, *Respondent*.

On Petition For Writ Of Certiorari To The Texas Supreme Court And To The Texas Court Of Appeals, Fourteenth Supreme Judicial District

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the Due Process Clause of the Fourteenth Amendment violated when a Texas Court of Appeals Justice participated in a case without disclosing he was the senior visiting trial judge's first cousin (by affinity)?

2. Was meaningful court access denied when a Texas Court of Appeals Justice failed to recuse himself or disclose he was the senior visiting trial judge's first cousin?

LIST OF PARTIES

The parties to this civil forfeiture action against $165,524.78, are petitioner-Samuel Richard Mares and respondent-the State of Texas.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES ..... v-viii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTION, STATUTES, RULES AND CODES 3-6

U. S. CONST. AMEND. XIV §1

28 U.S.C. §458 (West Supp. 2002)

Tex. R. App. P. 16 (Vernon Special Pamph. 2002)

Tex. R. Civ. P 18a, 18b (Vernon Supp. 2002)

Tex. Code Judicial Conduct

STATEMENT OF THE CASE 7-12

REASONS FOR GRANTING THE PETITION 13-25

A. Conflicts In Principle With Supreme Court Precedent 13

B. Importance Of Independent Adjudicator 20

1. Constitutional Values Underlying Parallel Clarified Federal Approach 21

TABLE OF CONTENTS - Continued

Page

2. *Constitutional Concerns Regarding Judicial Impartiality and Integrity Heightened By Partisan Judicial Elections And Appointment Of Defeated Judges From Other Regions* 23

CONCLUSION..... 25

APPENDIX

1. Order denying rehearing of petition for review and motions relating to justice's participation. .....App. 1

2. Order denying rehearing of motions regarding justice's participation .....App. 2

3. *$165,524.78 v. State of Texas*, 47 S.W.3d 632 (Tex. App.--Houston [14th Dist.] 2001, pet. denied) .....App. 3-34

TABLE OF AUTHORITIES

Page

Cases:

Aetna Life Insurance Co. v. Lavoie, 475 US 813 (1986) 2, 12, 13, 14, 15, 16, 17, 20, 21

Christopher v. Harbry, 122 S.Ct. 2179 (2002) 18, 20

$11,014 v. State, 828 S.W.2d 814 (Tex. App.–Houston [1st Dist.] 1992, no writ) ...2, 15

$56,700 v. State, 730 S.W.2d 659 (Tex. 1987) 15

In re. Murchison, 349 U.S. 133 (1955) 17

In re. Union Pacific Resources Co., 969 S.W.2d 427(Tex. 1998) (Hecht, J., concurring) 18

Johnson v. Mississippi, 403 U.S. 212 (1971)(per curiam) 20

Johnson v. Pumjani, 56 S.W.3d 670 (Tex. App.–Houston [14th Dist.] 2001, no pet.) 18, 20

Liljeberg v. Health Services Corp., 486 U.S. 847 (1988) 12, 13, 18, 19

Liteky v. U.S., 510 U.S. 540 (1994) 13, 14, 16

Marshall v. Jerrico, Inc., 446 U.S. 238(1980) 17, 20

$165,524.78 v. State of Texas, 47 S.W.3d 632 (Tex. App.–Houston [14th Dist.] 2001, pet. denied) 1-2, 15, 16

Potashnick v. Port City Const. Co., 609 F.2d 1101 (5th Cir. 1980) 15, 17

Republican Party of Minn. v. White, et al., 70 U.S.L.W. 4720 (U. S. June 27, 2002) 20

TABLE OF AUTHORITIES – Continued

Page

Sao Paulo of Fed. Rep. v. American Tob. Co., 122 S.Ct. 1290 (2002)(per curiam) 13

SCS Servs., Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977) 15

State v. $11,014, 820 S.W.2d 743 (Tex. 1992) 15

Sun Exploration v. Jackson, 783 S.W.2d 202 (Tex. 1989)..... 18

Ward v. Monroeville, 409 U. S. 57 (1972) 16

Constitutions:

U. S. CONST. AMEND. XIV §1 .....3, 10

TEX. CONST. art. V §6 (Vernon Supp. 2002) 8

Statutes:

28 U.S.C. §458 (West Supp. 2002) ..2, 3, 12, 14, 16, 21

Rules:

Tex. R. App. P. 16 (Vernon Special Pamph. 2002) 3, 18

Tex. R. Civ. P. 18a (Vernon Supp. 2002) 4

Tex. R. Civ. P. 18b (Vernon Supp. 2002) 4, 18

Tex. R. Civ. P. 18b(2)(a) (Vernon Supp. 2002) 4, 9, 14

TABLE OF AUTHORITIES - Continued

Page

Codes:

Tex. Code Crim. Proc. art. 59.05(d) (Vernon Supp. Pamph. 2002). 7

Tex. Code Jud. Conduct, Preamble, Canons 1-3 .....4, 5, 19

Tex. Gov't Code Ann. §22.225(a) (Vernon Supp. 2002) 8

Tex. Gov't Code Ann. §573.001, et seq. 14

Tex. Health & Safety Code Ann. §481.112, 481.115 (Vernon Supp. 2002) 7

Tex. Penal Code Ann §12.35 (Vernon 1994) 7

Law Reviews:

Nelson, *The Supreme Court Takes A Weapon From The Drug War Arsenal: New Defenses To Civil Drug Forfeiture,* 26 St. Mary's L. J. 157, 159-160 (1994) 7

Redish and Marshall, *Adjudicatory Independence and the Values of Procedural Due Process,* 95 Yale L. J. 455 (1986). 15, 20

Congressional Debates:

144 CONG. REC. H 9985 (daily ed. October 7, 1998)(statement by Rep. Dunn) 22

144 CONG. REC. S 11578 (daily ed. October 6, 1998)(statement by Sen. Kyl) 23

TABLE OF AUTHORITIES - Continued

Page

Newspaper Articles:

Counting Cash in Candidates' Campaign Coffers, The Texas Lawyer, July 24, 2002; Also see; the Houston Chronicle, July 13, 2002.....24

Committee to Evaluate Texas' Trial Court System The Texas Lawyer, March 27, 2002 24

IN THE

SUPREME COURT OF THE UNITED STATES

$165,524.78 (Samuel Richard Mares), *Petitioner*,
v.

THE STATE OF TEXAS, *Respondent*.

On Petition For Writ Of Certiorari
To The Texas Supreme Court And
To The Texas Court Of Appeals,
Fourteenth Supreme Judicial District

Petitioner, Samuel R. Mares, respectfully prays a writ of certiorari issue to review the Texas Supreme Court's decisions on motions challenging a Court of Appeals Justice's participation in a case without having disclosed he was the senior visiting trial judge's first cousin (by affinity), and thus the court of appeals' opinion that affirmed a $163,000 civil forfeiture.

OPINIONS BELOW

The Texas Supreme Court order is reprinted at App. 1, and the order denying rehearing thereon is at App. 2. The motions (and for rehearing thereon) raising the federal constitutional issues are reprinted at Lodging A and B, Also see: Lodging C-D.

The underlying Texas Court of Appeals judgment and opinions are reprinted at App. 3-34, and Lodging E, App. 3. *$165,524.78 v. State of Texas*,

47 S.W.3d 632 (Tex. App.--Houston [14th Dist.] 2001, pet. denied).

JURISDICTION

On April 5, 2001, a three (3)-judge panel of the Fourteenth Court of Appeals affirmed a $163,000 civil forfeiture, with one Justice dissenting. App. 3-34; Lodging E, App. 3. On January 17, 2002, the Texas Supreme Court denied a petition for review.

A motion for rehearing from the denial of the petition for review was filed, with three (3) motions challenging the participation of one of the court of appeals justices, which was as soon as facts were discovered that formed a basis for him not to have heard the appeal: namely, that he was the senior visiting trial judge's first cousin by affinity. Lodging A. On March 14 the court denied the motions relating to the justice's participation, and rehearing of the petition for review. App. 1. Petitioner moved for rehearing of the motions regarding the justice's participation, which was denied on April 11, 2002. App. 2.

On May 30, 2002, Justice Scalia extended the time to file the petition for writ of certiorari to and including August 12, 2002.

Jurisdiction is under 28 U.S.C. § 1257(3). Also see: *Aetna Life Insurance Co. v. Lavoie*, 475 US 813, 819-820 (1986)(jurisdiction existed to review if state judge's participation violated due process where issue was raised by motions after opinion on the merits, but as soon as facts were discovered forming basis for unseating the judge).

CONSTITUTION, STATUTES, RULES and CODES

UNITED STATES CONSTITUTION, AMEND. XIV §1

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction equal protection of the law.

28 U. S. C. §458 Relative of justice or judge ineligible to appointment

...

(b)(2) No person may be appointed to the position of judge of a court exercising judicial power under article III of the United States Constitution (other than the Supreme Court) who is related by affinity or consanguinity within the degree of first cousin to any judge who is a member of the same court.

Tex. R. App. P. 16. Disqualification Or Recusal Of Appellate Judges

16.2 Grounds for Recusal. The grounds for recusal of an appellate court justice or judge are the same as those provided in the Rules of Civil Procedure...

16.3 Procedure for Recusal

(a) Motion. A party may file a motion to recuse a justice or judge before whom the case is pending. The motion must be filed promptly after the party has reason to believe that the justice or judge should not participate in deciding the case.

(b) Decision. Before any further proceeding in the case, the challenged justice or judge must either remove himself or herself from all participation in the case or certify the matter to the entire court, which will decide the motion by a majority of the remaining judges sitting en banc. The challenged justice or judge must not sit with the remainder of the court to consider the motion as to him or her.
(c) Appeal. An order of recusal is not review able, but the denial of a recusal motion is review able.

Tex. R. Civ. P. 18a Recusal Or Disqualification of Judges

(a) ...The motion shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence provided that facts may be stated upon information and belief if the grounds of such belief are specifically stated.

Tex. R. Civ. P. 18b Grounds For Disqualification And Recusal of Judges

(2) Recusal. A judge shall recuse himself in any proceeding in which:
(a) his impartiality might reasonably be questioned...

(5) The parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record.

Texas Code of Judicial Conduct

Preamble

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts

of justice and the rule of law. Intrinsic to all sections of the Code of Judicial Conduct are the precepts that judges individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is the arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law...

Canon 1 Upholding The Integrity And Independence Of The Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved. The provisions of this Code are to be construed and applied to further that objective.

Canon 2 Avoiding Impropriety And The Appearance Of Impropriety In All Judge Activities

A. A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow any relationship to influence judicial conduct or judgment...

Canon 3 Performing The Duties Of Judicial Office Impartially And Diligently

...

(B)(1) A judge shall hear and decide matters assigned to the judge except those in which

disqualification is required or recusal is appropriate.

Canon 8 Construction and Terminology Of The Code

...

(B)(1) "Shall" or "shall not" denotes binding obligations the violation of which can result in disciplinary action.

STATEMENT OF THE CASE

After six (6) months of undercover surveillance of Samuel Mare's home failed to reveal any drug activity other than a video camera in a tree opined as being consistent with same [RR III 14-17, 19-20, 116-119, 126-127, 129 IV 8-9, 13, 18, 25-27, 48, 97-100, 104, 150-151, 158], police followed Sam's truck to arrest and search him if he broke a traffic law. RR III 26-29, IV 7, 21, 50-51. Sam was stopped, ticketed (the tickets were later dismissed), arrested and jailed, for allegedly failing to signal a lane change. RR III 31, 35-36, 39, 118-120, 132-133 IV 9-14, 18-19, 23-25, 44-45, 187-188. His infant son was taken into custody. RR III 34, IV 12-13, 26, 30-31, 34, 41, 52, 103-104, 134, 170-171. Sam's truck and home were searched. No drugs were found, other than trace amounts of cocaine residue on some of the money and on a safe containing some of the money. No criminal charges were filed for narcotics violations.[1]

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[1] Query whether this was because if Sam had been charged and acquitted, a rebuttable presumption of nonforfeitability would have arisen. Tex. Code Crim Proc. art. 59.05(d)(Vernon Supp. Pamph. 2002). Also, had Sam been charged with the underlying offenses of Delivery or Possession of a Penalty Group 1 Substance, his maximum potential fine for either state jail felony was $10,000 (plus 180 days-2 years incarceration). Tex. Penal Code Ann §12.35 (Vernon 1994), Health & Safety Code Ann. §s 481.112, 481.115 (Vernon Supp. 2002). Civil forfeitures provide few of the constitutional guarantees in criminal cases, often yielding the State significantly more money, as herein. Nelson, *The Supreme Court Takes A Weapon From The Drug War Arsenal: New Defenses To Civil Drug Forfeiture*, 26 St. Mary's L. J. 157, 159-160 (1994).

Instead, the State of Texas filed this *in rem* civil forfeiture action against $165,524.72, and a jury forfeited $163,000 to the State. The Fourteenth Court of Appeals affirmed, 2-to-1, rejecting the only points raised, that the evidence was legally and factually insufficient[2] to support the findings. Justice Edelman, joined by Justice Anderson, were in the majority; Justice Wittig dissented. App. 3-34; Lodging E, App. 3. After rehearing was denied, new counsel (Barron) substituted-in at the Texas Supreme Court, and filed a petition for review. Lodging E. The State failed to timely respond, but after the Court requested a response one was filed, to which petitioner replied. Just two days later, on January 17, 2002, the petition for review was denied.

After the petition for review was denied but before the motion for rehearing was due, it was discovered that Justice Anderson and the Senior Visiting Trial Judge (Hon. P. K. Reiter) were first cousins by affinity (i.e. Justice Anderson is Judge Reiter's wife's first cousin, their fathers being brothers). Thus, at the earliest opportunity, on February 1, 2002, with the motion for rehearing from the denial of petition for review, petitioner filed three (3) motions urging--(1) reversal and rendition; (2) reversal and remand to a new panel; or (3) abatement for a recusal motion to be filed--based on Justice Anderson's failure to self-recuse or to disclose the relation, or he was deprived of

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[2] In Texas, the court of appeals is the final determiner of factual sufficiency. TEX. CONST. art V, §6 (Vernon Supp. 2002); Tex. Gov't Code Ann. §22.225(a)(Vernon Supp. 2002).

federal and state constitutional rights, including to due process and due course of law in being denied an opportunity to be heard on an issue central to the integrity of the judicial process. Lodging A. Under Tex. R. Civ. P. 18b(2)(a)(Vernon Supp. 2002), Justice Anderson had to recuse because his "impartiality might reasonably be questioned". Attached to the motions were counsels' affidavits (amended, February 4, 2001), certified copies of public records (i.e. birth and marriage certificates) and copies of computer research of the Judges' family lineage. Lodging A, App. Counsel at the court of appeals (Santos) had been unaware of the relation, there was nothing to put him on notice about it, and had he been so advised he would have moved to recuse Justice Anderson. Lodging A, App.

Petitioner noted that although his counsel had the utmost regard for both Judges, and while he likely would not object to Justice Anderson sitting in another case he might have, here his objection was legitimate, as it would be were any other Justice related to the trial judge. He argued:

> "The efficient administration of justice is not unduly burdened or disrupted by recusing appellate judges related to the trial judge. ...In the geographic area encompassed by the Houston Court of Appeals there are seventeen (17) other full time Appellate Justices and many other Judges who sit by assignment, who could hear any appeal which might emanate from any of the cases in which Judge Reiter presided or will preside, or in which there is a relation between another justice and the trial judge who entered judgment. Judge

> Reiter is a respected Senior District Judge, who the citizens of this State are fortunate to have to hear cases on a visiting basis. Likewise is true of Justice Anderson on the Fourteenth Court of Appeals. It is just that in this case Justice Anderson should have recused on his own initiative or disclosed the familial relation affording counsel the opportunity to have moved for recusal (or waived it). This is of particular import at the appellate level when factual sufficiency is raised, as herein, since the court of appeals is the final arbiter of such matters. With all due respect, in this very close case, given the dissent, a change in one vote would have changed the disposition in petitioner's favor. ...". Motion for rehearing, p. 14-15, Lodging A.

On March 14, 2002 by way of a one-page order, the motions relating to Justice Anderson's participation were denied, as was rehearing of the petition for review. App. 1.

On March 29 rehearing of the recusal issue was sought, urging: "The Texas Supreme Court erred in denying motions based on after-acquired knowledge relating to recusal of an intermediate appellate court judge because his "impartiality might reasonably be questioned' due to being related to the trial judge, and in doing so violated petitioner's federal and state rights, including his right to properly present his case and his constitutional rights of meaningful access to the courts, due process and due course of law. ... US CONST. amend XIV. ...". Lodging B, p. 3. The Court was informed that Justice Anderson had failed to recuse or disclose at least twice before,

again affirming Judge Reiter, including once when whether Judge Reiter could be stricken was the very issue to be decided: the lawyers did not know about the relation, opined it should have been disclosed, and that had it been they each would have moved to recuse or consulted his client about doing so.[3] Motion for rehearing, p. 4-5, Lodging B; Lodging, C, Supplemental letter filed April 1, 2002, noting other case [*Hourani*] and affected lawyer from successor law firm of Justice Anderson's father, and affidavit of lawyer from another like case mentioned in motion for rehearing [*Okpamen*].[4] This was discovered after the denial of the original motion, through computer research on the court's incomplete website. Lodging B, Motion for rehearing, p. 5, fn. 4. Practical implications of failing to enforce a judge's duty to disclose familial relations were cited: namely, (1) imposing costs on litigants to obtain genealogical information where a lawyer/party might overhear of a potential relation[5]; and (2) placing lawyers in ethical and professional-courtesy dilemmas about how to obtain the facts, particularly with short time

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[3] It is unknown how many more cases there are, if any, where Justice Anderson participated, or is participating, on appeal from a judgment entered by Judge Reiter. Lodging B, p. 5, fn. 4.

[4] See: Justice Anderson's birth certificate, attached to counsel Barron's affidavit to motion for rehearing of petition for review and motions relating to recusal showing Justice Anderson's father's employer [Lodging A, App.], and counsel Barron's supplemental letter to court dated April 1, 2002, Lodging C.

[5] See Motion for rehearing, p. 3-4, fn. 3, Lodging B, outlining the circumstances showing the issue was raised as soon as the facts were discovered about the relation.

constraints, as herein. Motion fro rehearing, p.3-5, at Lodging B; Also see: *Lavoie*, 475 U.S. at 817-818; *Liljeberg v. Health Services, Corp.*, 486 U.S. 847, 866-867 (1988) (burdensome and embarrassing proceedings were result of judge's nonrecusal and nondisclosure). Finally, noted was the federal law prohibiting even the appointment of a judge to the same court related within the degree of first cousin (by consanguinity or affinity) to a sitting federal judge[6] and anecdotal information about the practices of other appellate judges with trial judge-relatives.[7]

On April 11, 2002, rehearing of the motions relating to recusal was denied. App. 2.

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[6]April 2 supplemental letter citing 28 U.S.C. §458 (West Supp. 2002), Lodging D.

[7]Motion for rehearing, p. 5 (the Smith brothers (Jack and Shearn) of Houston, Texas) at Lodging B; April 1, 2002 supplemental letter (the Arnold brothers (Richard and Morris ("Buzz") of the United States Court of Appeals for the Eighth Circuit) at Lodging C.

REASONS FOR GRANTING THE WRIT

A. Conflicts In Principle With Supreme Court Precedent

The average reasonable person on the street[8] would question Justice Anderson's impartiality in affirming his cousin-in-law/Judge Reiter, and in influencing others on the court to do so given the collaborative nature of appellate proceedings. *Lavoie*, 475 U.S. at 831. That the Texas Supreme Court was informed that Justice Anderson had reviewed at least two other matters heard by Judge Reiter, and still failed to correct this fundamental unfairness, shows that State Courts need guidance about the constitutional parameters of such a practice.

Although most questions about a judge's qualifications to hear cases are determined by common law, statutes or professional standards, the Due Process Clause of the Fourteenth Amendment delineates the outer boundaries of judicial service based on the fundamental guarantee to a fair trial in a fair tribunal: the question being whether sitting on the case would possibly tempt the average judge not to hold the balance nice, clear and true. *Lavoie*, 475 U.S. at 820-822. Petitioner could locate no reported cases dealing specifically with an appellate judge-trial judge relation, and no specific state judicial anti-nepotism statute--as in federal court [*Cf.* 28 U.S.C.

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[8] This is an objective standard for determining if a judge's impartiality might reasonably be questioned. *Sao Paulo of Fed. Rep. v. American Tob. Co.*, 122 S.Ct. 1290, 1292 (2002)(per curium); *Liteky v. U.S.*, 510 U.S. 540, 548 (1994); *Liljeberg v. Health Services Corp.*, 486 U.S. 847, 860-861 (1988).

§458 (West Supp. 2002)]--other than the rule that a judge shall not sit where his "impartiality might reasonably be questioned".[9] Tex. R. Civ. P. 18b(2)(a)(Vernon Supp. 2002).

This Court has noted that what degree or kind of interest is sufficient to disqualify a judge from sitting cannot be defined with precision, but that there is a constitutional floor. *Lavoie*, 475 U.S. at 822, 828. Thus an Alabama Supreme Court judgment was vacated because the Justice who cast the deciding vote in that court of last resort had a pending lawsuit that was affected by his decision. 475 U.S. 813. However, non-pecuniary bias poses significant due process concerns as well, at least equal to any financial interest, and should be const-

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[9] In Texas (as in federal court) there are specific rules dealing with judge-party relation and judge-lawyer relation, but unlike federal court there are none specifically addressing the judge-lawyer relation and its unique impact on the justice system. 28 U.S.C. §458 (West Supp. 2002); Cf. Tex. Gov't Code Ann. §573.001, et seq. Thus, query Justice Scalia's versus Justice Kennedy's approaches with regard to whether more specific subsections of a recusal statute apply to the catch-all recusal ground that a judge shall not sit where his impartiality might reasonably be questioned, to define degree of relation, where the context is the unique judge-judge relation scenario that implicates the integrity of the judicial process itself. *Cf.* Justice Kennedy's "autonomous operation" approach. *Liteky*, 501 U.S. at 553, fn. 2, and 566-567 (Kennedy, J., concurring).

Also see: Motion for rehearing, Lodging B, p. 5, and Supplemental letter, April 1, Lodging C anecdotal information about two (2) judge-brother situations. It is petitioner's understanding that Justice Breyer too has a brother who is a U. S. District Judge and that he does not hear any matters from his brother's court.

itutionally disqualifying, like when a close relative sits as a judge on the same court, as herein. Justice Brennan opined that due process can require recusal based on non-pecuniary influences [*Lavoie*, 475 U.S. at 829-830 (Brennan, J., concurring)], and the Fifth and Seventh Circuits are in accord. *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1113 (5th Cir. 1980); *SCA Servs., Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977). Professor Redish reasons "a judge is likely to be far more concerned with giving his brother-in-law a break than with securing $5.00 for a traffic conviction. ...". Redish and Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L. J. 455, 501 (1986).

That Justice Anderson was the deciding vote in a 2-1 affirmance of a $163,000 civil forfeiture, where no criminal charges were filed, and where the court of appeals was the final arbiter on factual sufficiency, exacerbates the fundamental unfairness, either in fact or in appearance, as in *Lavoie*, 475 U.S. at 822-823 (that State Supreme Court Justice was deciding vote in court of last resort violated petitioner's due process rights); *Cf.* Brennan, J., concurring (mere participation violates due process due to collaborative nature of appellate proceedings) *Id.* at 830-831; Also see: Blackmun and Marshall, J., concurring (rejecting the majority's deciding-vote concept in favor of mere participation) *Id.* at 831-833. Specifically, the two Texas Supreme Court cases the majority opinion notes as the most recent relevant civil forfeiture decisions [47 S.W.3d at 634, at App. 6-7] reversed as either legally insufficient [*$56,700 v. State*, 730 S.W.2d 659 (Tex. 1987)], or affirmed based on legal sufficiency [*State v. $11,014*, 820 S.W.2d 743 (Tex. 1992))] *but on remand reversed as factually insufficient.* See: *$11,014 v. State*, 828 S.W.2d 814, 817 (Tex.

App.--Houston [1st Dist.] 1992, no writ). Yet with *no mention* one of the key holdings on *remand* reversed based on factual insufficiency (*$11,014, id.*), the court affirmed, with Justice Anderson as the deciding vote, holding the evidence legally and factually sufficient to support the verdict and judgment. 47 S.W.3d at 637, App. 4-12.

Liteky v U. S. affirmed a U. S. District Judge staying on a case, despite challenges his impartiality might reasonably be questioned based on his in-court remarks, holding whether to recuse was limited by the extrajudicial source doctrine unless the bias or prejudice was so extreme as to show a clear inability to be fair. 510 U.S. 540, 551 (1994). Given the fundamental nature of the interest at stake--the integrity of the justice system--four (4) concurring Justices (Kennedy, Blackmun, Stevens and Souter) focused instead on whether an objective observer would conclude the judge's attitude or state of mind made a fair and impartial hearing unlikely. *Id.* at 564. Here, the bias is extrajudicial, and at least according to our elected federal representatives, a justice reviewing a close judge-relative's judgment leads to questions about his ability to be fair and impartial. See: discussion below about congressional debates in connection with amending 28 U.S.C. §458.

The Due Process Clause sometimes bars judges without actual bias from sitting where there is an appearance of partiality [*Lavoie*, 475 U.S. 813; *Liteky*, 510 U.S. at 567], depending on whether the situation would tempt the average judge to not hold the balance nice, clear and true. *Lavoie*, 475 U.S. at 822, citing *Ward v. Monroeville*, 409 U. S. 57, 60 (1972). A cardinal principle of our justice system is that not only must there be the reality of a fair

trial and impartiality that satisfies due process, but also the appearance of a fair trial and impartiality. *Marshall v. Jerrico*, Inc., 446 U.S. 238, 242-243 (1980); *In re. Murchison*, 349 U.S. 133, 136 (1955). "Justice must satisfy the appearance of justice". *Lavoie*, 475 U.S. at 825, citing *Murchison, id.* The requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. *Tumey v. Ohio*, 273 U.S.510, 532 (1927). Thus, even if Justice Anderson felt he could be fair, as he undoubtedly must have, so as not to rule against petitioner because the trial judge was his close relative[10], his impartiality might reasonably be questioned on that basis so Justice Anderson was not permitted to sit, which his repeated nonrecusals and nondisclosures shielded. In any event, the decision whether Justice Anderson should have sat was petitioner's lawyer's to make, subject to appeal, and not Justice Anderson's from the inception and without disclosure, unless he had self-recused. Where a jurist's impartiality "might" reasonably be questioned, he must recuse if there is any question about his sitting. *Potashnick*, 609 F.2d at 1111-1112, 1115. The system is not unduly burdened by this given the availability of other judges, along with transportation and technology to ease any transfer. *Id.* at 1112. Here seventeen (17) other full-time appellate justices are available in the geographic area involved, and countless visiting judges, to hear any appeals that might arise from

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[10] All three cases petitioner located affirmed Justice Reiter.

judgments entered by Judge Reiter. Motion for rehearing, p. 14-15, Lodging A.

At the very least, the constitution mandated notice, a hearing and appeal therefrom about whether the close familial relation required recusal. The constitution will not permit an appellate judge to avoid controversy about his or her participation by failing to disclose a relation to the trial judge. Meaningful court access is constitutionally required, and there is none where a judge, by non-disclosure of facts prevents the filing of a motion to recuse [*Christopher v. Harbry*, 122 S.Ct. 2179, 2186 (2002)], which if filed would have then left just two options: to self-recuse or refer the matter to the court, en banc, subject to appeal in the event recusal was denied. Tex. R. App. P. 16.2, 16.3. To exact the appearance of impartiality, Texas requires full on-the-record disclosure to waive a recusal ground. Tex. R. Civ. P. 18b(5); *Sun Exploration v. Jackson*, 783 S.W.2d 202, 206 (Tex. 1989)(discussion about appropriate remedy where knowledge of recusal grounds is after-acquired); *Martin v. State*, 876 S.W.2d 396, 397 (Tex. App.–Fort Worth 1994, no pet.); Also See: 28 U.S.C. §455(e)(disclosure required to waive judge's removal where his impartiality might reasonably be questioned), *Liljeberg*, 486 U.S. at 860, citing *Hall v. SBA*, 695 F.2d 175, 179 (5th Cir. 1983). A judge's actions are void if a motion to recuse is filed and he fails to self-recuse or refer the matter. *In re. Union Pacific Resources Co.*, 969 S.W.2d 427, 429 (Tex. 1998) (Hecht, J., concurring); *Johnson v. Pumjani*, 56 S.W.3d 670, 672 (Tex. App.–Houston [14th Dist.] 2001, no pet.). The Due Process Clause of the Fourteenth Amendment must require as much.

Standards of judicial conduct likewise advance judicial integrity and expressly provide that a judge should not sit when recusal is appropriate. Tex. Code Jud. Conduct, Canon 3(B)(1). Judges have a duty to uphold the law and the Constitution, to avoid even an appearance of impropriety, and to act so as to promote public confidence in judicial integrity and impartiality. Tex. Code Jud. Conduct, Canon 2. A judge can not allow any relationship to influence his judicial conduct or judgment. Tex. Code Jud. Conduct, Canon 2 (B).

Petitioner's situation is similar to *Liljeberg*, where this Court retroactively vacated a judgment based on a U. S. District Judge's failure to self-recuse or to disclose he was a trustee on a university board engaged in negotiations with one of the litigants before him, which formed a basis from which his impartiality might reasonably be questioned. 486 U.S. 847. The result of Judge Collin's nonrecusal and nondisclosure were characterized as "burdensome" and "embarrassing" proceedings in that his silence deprived the litigant there of a basis for raising the issue in the main case. *Id.* at 866-867. Particular consternation was voiced about the judge's failure to indicate any awareness of a duty to disclose the facts underlying the basis for his recusal, in part creating precisely the appearance of impartiality to be prevented. *Id.* at 867-869; See: Motion for rehearing, p. 3-6, Lodging B. The same is true in the case at bar, in the sense that although the underlying facts were discovered before jurisdiction was lost, this proceeding has become burdensome and embarrassing as a result of Justice Anderson's silence, and Justice Anderson's repeatedly reviewing Judge Reiter's cases itself while remaining silent evinces an appearance of

impartiality. The *Liljeberg* dissents focused on there being a question about whether the judge had actual knowledge of the disqualifying facts, not an issue here since Justice Anderson certainly knows whom his relatives are. *Cf. Id.* at 870-873. Justice Anderson's participation in the appeal necessarily violated petitioner's rights to due process and meaningful court access. *Lavoie*, 475 U.S. at 813; *Harbry*, 122 S.Ct. 2179; also see: discussion below regarding congressional debates in amending 28 U.S.C. §458.

B. Importance Of Independent Adjudicator

Preserving the integrity of the judicial process is essential to our democracy. The citizen's respect for judgments depends on the issuing court's absolute probity. *Republican Party of Minn. v. White, et al.*, 70 U.S.L.W. 4720, 4728 (U. S. June 27, 2002)(Kennedy, J., concurring). The judicial role involves striving to do "what is legally right", and administering justice without respect to persons. *Id.* at 4732 , Ginsburg, J., dissenting. Impartiality is a "jealously guarded" value, for it "ensur[es] that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him". *Marshall*, 466 U.S. at 242.

An independent adjudicator is a requisite of due process: there can be no due process without one, regardless of any other procedural safeguards. *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971)(per curium); *Pumjani*, 56 S.W.3d at 672; Redish and Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L. J. 455 (1986). Most due process procedural guarantees deal with the opportunity to argue one's case effectively, yet

these procedures are meaningless if the decision maker's ruling is based on extrinsic personal factors rather than on the evidence. *Id.* at 476-477. Fundamental fairness requires an independent adjudicator, both to yield accurate findings and to achieve 'noninstrumental' goals, such as: the appearance of fairness; equality; predictability, transparency and rationality; participation; and revelation. *Id.* at 481-491.

1. Constitutional Values Underlying Parallel Clarified Federal Approach

Recusal by reason of kinship is generally a legislative determination, and is only accorded constitutional dimension where there is a violation of "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental". *Lavoie*, 475 U.S. at 820-821. Judges who are relatives, sitting on the same court, implicates the integrity of the justice system itself, a concern so fundamental it must be of constitutional dimension. This is supported by statements of our elected representatives voicing concerns over fundamental fairness issues in that context.

In 1998 Congress specifically addressed judge-relatives serving together on Federal Courts, and found it so repugnant it clarified (prospectively) that any judicial appointments (except to the Supreme Court) are prohibited where there is a sitting judge who is a relative within the degree of first cousin on the same court. 28 U.S.C. §458 (West Supp. 2002). Thus post-1998 whether the judge should be taken-off a case due to a judicial relation is no longer an issue in the federal system, because he or she will not be appointed in the first

instance if the relation exists.[11] During debates, the law's sponsor, Rep. Dunn, explained the rationale:

> "I believe that the law must apply to both employees and the judges if courts are to remain unbiased. It is the duty of Congress to ensure that the credibility of our judicial branch is not compromised. This is why I am supporting the Judicial Anti-Nepotism Act. ...If the law were not to apply to the familial relationship of judges, close family members would be able to serve concurrently on the same court, causing litigants to lose confidence in a system clearly designed to be objective and impartial. We simply cannot afford to let this happen. We must assure that federal judges are independent from any outside influence in order that their decisions be completely just and based on the laws and facts of the cases. When going to trial over serious, life changing issues, a litigant must be assured of the *right to be treated fairly*. When a judge sits in the position to overturn the decision of another judge who is a close relative sitting on a panel of judges, the litigant clearly is going to question the *impartiality and fairness* of the final court decision. Preventing close family members from serving on the same court is a small price to pay to avoid the appearance of a loss of *credibility of our court system*." 144 CONG. REC. H 9985 (daily ed. October 7,

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[11] Again, the other judge-judge relatives petitioner's counsel located, reported that they would not review their relative's cases

1998)(statement by Rep. Dunn)(emphasis supplied).

Senator Kyl, also supporting the bill, voiced the same concerns about fundamental fairness:

> "The public policy reasons...are fairly obvious. When a litigant is before the court, the litigant wants to know that he or she is being treated fairly. When a relative who is that close to a judge that may have decided a case on a panel of judges is then being called upon to review the decision of a close relative, the litigant clearly is going to have a question as to *whether his or her case can be treated fairly.*" ... 144 CONG. REC. S 11578 (daily ed. October 6, 1998) (statement by Sen. Kyl)(emphasis supplied).

In accord with these eloquent statements, litigants might reasonably question Justice Anderson's impartiality in reviewing matters heard by Judge Reiter, and thus the integrity of the judicial process itself. The integrity of the justice system itself is a principle of justice so rooted in the traditions and conscience of our people to be considered fundamental, thus important constitutional values are implicated by Justice Anderson's participation and nondisclosure, which are worthy of resolution herein.

2. Constitutional Concerns Regarding Judicial Impartiality and Integrity Heightened By Partisan Judicial Elections And Appointment Of Defeated Judges From Outside The Region

Petitioner would reiterate that State Courts need guidance about the constitutional bounds of

appellate judges reviewing judgments entered by trial judges-relatives and about, at the very least affording notice and an opportunity to be heard on that issue. In Texas, as in some other states, constitutional concerns are heightened, given: (1) the partisan election of judges; and (2) the prevalence of visiting judges, some defeated, sitting by assignment, who may be from another locale, and thus whose background may be unknown to the resident lawyers. The partisan election system by which Texas selects judges has been publicly criticized by some, including Texas Supreme Court Chief Justice, Thomas R. Phillips, who was recently quoted calling the system "dysfunctional", likely leaving citizens questioning the quality and impartiality of the judiciary that a "dysfunctional" system would select, particularly given the public debate about campaign finance reform. *Counting Cash In Candidates' Campaign Coffers,* The Texas Lawyer, July 24, 2002 (at Lodging F); The Houston Chronicle, July 13, 2002. To compound appearance issues regarding judicial integrity and fairness, Judge Reiter was sitting by assignment, and the visiting judge system was recently investigated, the Texas Lawyer newspaper reporting that in 2001 visiting judge service was equal to appointing 98 full-time judges to the Texas courts. Rob Kepple of the Texas District County Attorneys Association voiced concern that a judge who lost re-election could even be assigned to hear cases. Judge Jimmy White of the 76th District Court in Mount Pleasant, Texas, reported that visiting judges are often used in rural areas when conflicts arise because a sitting judge is related to a party: "We try to avoid it when we can", Judge White was quoted as saying. *Committee To Evaluate Texas' Trial Court System,* Texas Lawyer, March 27, 2002. (at Lodging G). Of course the litigants are more likely to know of a

judge-party relation in a rural area, where both the judge and the party reside. However, given the prevalence of visiting judges and what occurred here, and at least twice before with the same Justice—a defeated trial judge (Reiter) from a rural area (here, Mexia, Texas) hearing cases in a large metropolitan area (here, Houston) where he had a judge-relative in the same court system with a different last name (Anderson) sit on the same case, unbeknownst to all--under the Constitution, it cannot be allowed to happen again, with these or any other judges. In this scenario, Justice Anderson's impartiality might reasonably be questioned, and remaining on the case without disclosure violated petitioner's rights to due process and meaningful court access.

CONCLUSION

For these reasons, this petition for certiorari should be granted. Petitioner prays the Texas Supreme Court's decision be vacated that denied petitioner's rights had been violated, and the underlying judgment and opinion of the Texas Court of Appeals for the Fourteenth Supreme Judicial District be vacated/reversed, and remanded for further proceedings not inconsistent with this Court's opinion.

Respectfully submitted,

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APPENDIX

THE SUPREME COURT OF TEXAS
Orders Pronounced March 14, 2002

THE MOTIONS FOR REHEARING
IN THE FOLLOWING PETITIONS
FOR REVIEW ARE DENIED:

01-0620

$165,524.78 v. THE STATE OF TEXAS; from Harris County; 14th district (14-99-00200-CV, 47 SW3d 632,04-05-01)

Motion to abate and remand to consider recusal grounds discovered post-appeal denied

Motion to reverse or remand on merits denied

Motion for rehearing by a new panel denied*

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* By letter to counsel dated March 14, 2002, the Clerk advised: "Today, the Supreme Court of Texas denied the motion for rehearing of the above style petition for review. The Court also denied the following motions: the motion to abate and remand to consider recusel grounds discovered post-appeal, the motion to reverse or remand on merits, and the motion for rehearing by a new panel." (See: Lodging B, App. 1).

THE SUPREME COURT OF TEXAS
Orders Pronounced April 11, 2002

ORDERS ON CAUSES
MISCELLANEOUS

THE MOTION FOR REHEARING OF ORDER DENYING MOTIONS RELATING TO NEWLY DISCOVERED GROUND FOR RECUSAL IN THE FOLLOWING CASE IS DENIED:

01-0620

$165,524.78 v. THE STATE OF TEXAS; from Harris County; 14th district (14-99-00200-CV, 47 SW3D 632, 04-05-01)

April 5, 2001

JUDGMENT

The Fourteenth Court of Appeals

$165,524.78, Appellant

NO. 14-99-00200-CV V.

THE STATE OF TEXAS, Appellee

This cause, an appeal from the judgment in favor of The State of Texas, signed February 26, 1999, was heard on the transcript of the record. We have inspected the record and find no error in the judgment. We order the judgment of the court below **AFFIRMED**.

We order Samuel Mares, to pay all costs incurred in this appeal. We order this decision certified below for observance.

Affirmed and Opinion filed April 5, 2001

In The

Fourteenth Court of Appeals

NO. 14-00-01478-CV

$165,524.78 (Samuel Richard Mares), Appellant

V.

The STATE of Texas, Appellee.

On Appeal From the 113th District Court
Harris County, Texas
Trial Court Cause No. 96-06444

Panel consists of Justices Anderson, Edelman, and Wittig

MAJORITY OPINION

EDELMAN, Justice.

Samuel Mares appeals a judgment forfeiting $163,000 to the State on the grounds that there is no evidence or insufficient evidence to support the jury's finding that the money seized from Mares's home and automobile was contraband. We affirm.

Background

In early 1996, Harris County Sheriff's Deputy William Tipps received information from his father, James Godfrey, a Houston Police Officer,

that narcotics activity was being conducted at 6841 Malibu. Tipps watched the house at that address on and off for six months looking for suspicious activity. On January 9, 1996, approximately six months after receiving the information from Godfrey, Tipps saw Mares leave the house carrying a Crown Royal bag and followed him. Mares was thereafter stopped and arrested for a traffic violation, and a search of his vehicle revealed the Crown Royal bag containing $18,000.00 in cash and two additional bags containing $1,220.78 and $1,304.00. A narcotics dog was called to the scene and made a positive alert for cocaine on all three bags. Officers also requested and obtained permission from Jody French, a resident of the house at 6841 Malibu, to search that residence. In the search, the police found containers of vitamin B powder, a television connected to an outdoor video monitor, small plastic bags, trash bags containing an odor of marijuana and some seeds, and a safe containing $145,000.00 in cash and $14,000.00 in savings bonds.

The State brought an action to obtain a forfeiture of $165,524.78 of the money seized by the police. At trial, the jury found that the money was "contraband," and the trial court ordered forfeiture of $163,000.00 of it. [1]

Requisites for Forfeiture

Property, including money, is subject to seizure and forfeiture if it is shown to be "contraband." *See*

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[1] The $163,000.00 consisted of the $18,000.00 found in the vehicle and the $145,000.00 found in the house. It thus did not include the remainder of the cash from the vehicle or the savings bonds.

TEX. CODE CRIM. PROC. ANN. art. 59.02(a) (Vernon Supp.2000). "Contraband" is property used or intended to be used in the commission of certain felonies, or proceeds derived from those felonies, including drug-related offenses described in section 481.112 of the Health and Safety Code. See TEX. CODE CRIM. PROC. ANN. art. 59.01(2)(A)- (C) (Vernon Supp.2000); TEX. HEALTH & SAFETY CODE ANN . §481.102, 481.112 (Vernon 1992). The character of seized money as contraband, subject to forfeiture, must be proved by the State by a preponderance of the evidence. *See* TEX. CODE CRIM. PROC. ANN. art. 59.05(b) (Vernon Supp. 2000). The proof may consist of circumstantial evidence. *State v. $11,014.00,* 820 S.W.2d 783, 785 (Tex.1991).

Legal Sufficiency

Mares's first and third points of error challenge the legal sufficiency of the evidence to prove that the money seized from his house and vehicle was contraband.

Standard of Review

The two most recent and relevant civil forfeiture decisions from the Texas Supreme Court appear to apply different standards to review legal sufficiency. In *$56,700.00,* police discovered money in Harry Farah's home, along with less than an ounce of cocaine, slightly more than an ounce of marijuana, and an array of drug paraphernalia, such as powdered vitamin B, scales, numerous vials, and two white "diamond folds" of paper with a cocaine residue. *$56,700.00 v. State,* 730 S.W.2d 659, 661-62 (Tex.1987). To explain the presence of the cash, Farah provided evidence of large cash

transactions conducted by his business. *Id.* at 662. Despite reciting that the legal sufficiency standard considers only evidence and inferences tending to support the forfeiture and disregards all evidence and inferences to the contrary, the five to four decision held that the State's evidence was legally insufficient because *when considered with the contrary evidence,* it was equally consistent with an inference of illegal drug activity as with no such activity. *Id. see also id.* at 662-63 (Campbell, J., dissenting).

By contrast, in *$11,014.00,* officers found, in a passenger's suitcase, money wrapped in bed sheets, which a drug dog's positive alert indicated had also been in recent close proximity to a controlled substance. *State v. $11,014.00,* 820 S.W.2d 783, 785 (Tex.1991). Although officers claimed the passenger appeared very nervous, stood off from the other passengers, continuously scanned the area looking back and forth in a suspicious manner, and was carrying only a single suitcase, which appeared to be very light, they did not find any drugs in his possession, nor did they see any exchange of narcotics. *Id.* at 784. The passenger in possession of the money testified that he had borrowed it from relatives in order to purchase a van. *$11,014.00 v. State,* 808 S.W.2d 288, 289-90 (Tex. App.--Houston [1st Dist.] 1991), rev'd, 820 S.W.2d 783 (Tex.1991). The Court of Appeals held that the evidence raised no more than a surmise or suspicion concerning the likely source or use of the money and reversed the forfeiture. *Id.* at 291. Reversing the Court of Appeals, the Texas Supreme Court considered only the circumstantial evidence supporting the forfeiture and held, per curiam, that it was legally sufficient to support an inference that the money was derived from the sale and/or distribution of a controlled substance. *$11,014.00,* 820 S.W.2d at 783,

785. Given the apparent disparity in approach between *$56,700.00* and *$11,014.00,* we will follow the latter because it is the more recent and more unanimous Texas Supreme Court decision on point.

Legal Sufficiency Review

According to Mares, the State did not present any direct evidence of a delivery or intent to deliver cocaine by Mares or anyone else at 6841 Malibu, and the State's circumstantial evidence failed to provide a sufficient nexus between the money and a drug-related felony. He contends that the State's evidence merely showed that items present at the house were consistent with drug activity, but not that the money seized was actually connected to any drug activity.

When evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex.1983). The "equal inference rule" similarly provides that meager circumstantial evidence from which equally plausible but opposite inferences may be drawn is speculative and thus legally insufficient to support a finding. *See, e.g., Wal-Mart Stores, Inc. v. Gonzalez,* 968 S.W.2d 934, 936 (Tex.1998).

Although the equal inference rule is well recognized, its application in determining the extent to which inferences can validly be drawn from circumstantial evidence in order to support a particular judgment has been a subject of considerable disagreement. *See, e.g., Lozano v.*

Lozano, 44 Tex. Sup.Ct. J. 499, 503-04, — S.W.3d ----, ---- - ----, 2000 WL 33216152 (March 8, 2001) (Phillips, C.J., concurring and dissenting); id. at 509-14, — S.W.3d ---- (Hecht, J., concurring and dissenting); William V. Dorsaneo, III, *Judges, Juries, and Reviewing Courts*, 53 SMU L.REV. 1497, 1507-11 (2000). One view focuses on the meagerness of the circumstantial evidence rather than whether it supports conflicting inferences equally or unequally:

> Properly applied, the equal inference rule is but a species of the no evidence rule, emphasizing that when the circumstantial evidence is so slight that any plausible inference is purely a guess, it is in legal effect no evidence. But circumstantial evidence is not legally insufficient merely because more than one reasonable inference may be drawn from it. If circumstantial evidence will support more than one reasonable inference, it is for the jury to decide which is more reasonable, subject only to review by the trial court and the court of appeals to assure that such evidence is factually sufficient.
>
> Circumstantial evidence often requires a fact finder to choose among opposing reasonable inferences. And this choice in turn may be influenced by the fact finder's views on credibility. Thus, a jury is entitled to consider the circumstantial evidence, weigh witnesses' credibility, and make reasonable inferences from the evidence it chooses to believe.

Lozano, 44 Tex. Sup.Ct. J. at 503-04, — S.W.3d ---- (Phillips, C.J., concurring and dissenting) (citations omitted). The contrary view asserts that, to support an inference, not only must the

circumstantial evidence be more than slight, but the inference to be drawn must be more probable than other reasonable inferences:

> It is true: that circumstantial evidence so slight that any plausible inference is purely a guess is no evidence; that circumstantial evidence is not legally insufficient merely because it supports more than one reasonable inference; that a fact finder may be required, and is entitled, to choose between competing reasonable inferences; and that this choice may require assessments of credibility. But these propositions do not resolve the issue here, which is: if circumstantial evidence supports two reasonable inferences, neither of which is any more likely than the other, can a jury pick one? The "equal inference" rule says no. It is not enough that one inference is as reasonable as another; to be given weight, an inference must be more probable than others....
>
> The passage quoted above from CHIEF JUSTICE PHILLIPS' opinion, distilled to its essence, says: ... 'If more than one reasonable inference can be drawn from a fact or circumstance, and neither is more probable than the other, then a jury can pick whichever one it wants, and it may choose the inference urged by a party who is otherwise more credible.'

Id. at 511, — S.W.3d — (Hecht, J., concurring and dissenting) (citations omitted).

In this case, the record reflects that small plastic bags, an outdoor video monitor, vitamin B powder, and trash bags with marijuana seeds were found in the residence in which a large amount of cash was

also located in a safe. According to the testimony, small plastic bags are commonly used to package cocaine, and vitamin B powder is commonly used to "cut" cocaine. Additionally, the inside walls of the safe contained 1.8 milligrams of cocaine, and the money from both the safe and Crown Royal bag tested positive for the presence of cocaine.

We believe that, taken together, this circumstantial evidence is adequate not only: (1) to support more than a mere surmise or suspicion that the confiscated money was used in, intended to be used in, or proceeds from, the commission of a drug-related felony; but also (2) to establish, even under the more restrictive version of the equal inference rule, above, that that inference is more probable than any inference therefrom that the money was not so used. Therefore, the evidence is legally sufficient to support the judgment, and points of error one and three are overruled.

Factual Sufficiency

Mares's second and fourth points of error challenge the factual sufficiency of the evidence to prove that the money seized from his house and vehicle was contraband. Mares contends that his explanation for the source of the money rebutted the evidence that the money was used or intended to be used in the sale of illicit drugs.

Standard of Review

When considering a factual sufficiency challenge, we consider all of the evidence, not just that which supports the verdict. *Maritime Overseas Corp. v. Ellis,* 971 S.W.2d 402, 406-07 (Tex.1998). We set aside the verdict only if it is so contrary to

the overwhelming weight of the evidence as to be clearly wrong and unjust. *Id.* at 407. However, we may not assess the witnesses' credibility or substitute our judgment for that of the jury, even if the evidence would clearly support a different result. *Id.*

Factual Sufficiency Review

Mares's factual sufficiency challenge relies on the following evidence. Tipps admitted he watched Mares's residence for six months without observing any type of drug activity there. Tipps also admitted he did not have any reason to believe that there was a drug business going on at the house other than the information he received from Godfrey. In addition, Mares produced evidence of funds he received from his father's estate and the sale of rental property. He also presented evidence that his jewelry business, car repair business, and rental properties all were cash businesses. Additionally, evidence was presented that the surveillance camera was at the house because it had been burglarized, that Mares and his son used vitamin B when they worked out, and that the small plastic bags were used in Mares's jewelry store to hold jewelry.

Although there was conflicting evidence, the jury's finding that the money was contraband is not so contrary to the overwhelming weight of the evidence as to be manifestly wrong and unjust. Accordingly, Mares's second and fourth points of error are overruled, and the judgment of the trial court is affirmed.

DISSENTING OPINION

WITTIG, Justice.

"*Sed quis custodial ipsos custodes?*[1] "

Seemingly, the greatest casualty of the war on drugs is the Constitution. Houston drug enforcement officers hastily seized contraband amounting to an astonishing one one-thousandth of an ounce (0.001 ounce). To accomplish this feat, they raided a Houston home without a warrant and held virtually hostage a surely innocent toddler. While still holding the infant, the government seized not only all of Samuel Mares' cash in his car, but also wheeled out his home safe and its contents. Based on this 0.001 ounce mountain of evidence, the government steals away with another victory in the war on drugs; the victory is sealed by trampling our most sacrosanct of laws. I respectfully dissent.

The State seized $165,524.78 cash and United States Savings Bonds from Samuel Mares' home and automobile in 1996. A jury awarded most of the seized cash to the State but found in favor of Mares on three items of cash and the bonds. I will examine the quantum of proof necessary for the government to seize and forfeit $163,000 cash and bonds from a Texan. In the examination of proof, both the majority and I note that circumstantial evidence is sometimes treated disparately by Texas Supreme Court. I also seek to reconcile those authorities to answer this sufficiency challenge in the context of civil forfeitures. "It makes sense to

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[1] "But who will guard the guards?" Juvenal, (Decimus Junius Juvenalis, c. 60-140 AD. Roman poet).

scrutinize governmental action more closely when the State stands to benefit." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 56, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 979, n. 9, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (opinion of Scalia, J.)).

Background

In 1995, a Harris County Sheriff's drug enforcement deputy, received a tip from his father, a Houston police drug enforcement officer, that narcotics activity was suspected at a Malibu house address, Mares' home. All deputies and Houston police involved in this case work in narcotics; none worked in traffic or other divisions. The house was watched for suspicious drug activity intermittently for six months. None was observed. In January 1996, Mares left his home accompanied by his young 15-month-old child. Because on this particular trip Mares carried a Crown Royal bag, narcotic officers arranged a pretext traffic stop by other narcotic officers, resulting in the arrest and jailing of Mares as well as the seizures. The child was also held against the protestations of his mother. The arrest occurred near Mares' work destination. The search incident to the pretext stop arrest produced three of the five seized items from Mares' vehicle. In the Crown Royal bag was $18,000 cash. Two paper sacks containing $1304.00 and $1220.78 respectively were also seized but later returned in accordance with the verdict. Although a narcotics dog ordered to the scene alerted on all three items, only one item later tested positive for an unascertainable amount of contraband. While holding her 15-month-old child in the rear of a police vehicle for over three hours, police obtained the consent of another occupant of the Malibu

house, Jody French, the notably upset mother of the 15-month-old toddler.

Moving to the Malibu house, the multi-car narcotics task force conducted a warrantless search of the house and garage. They found an outdoor video monitor, motorcycle memorabilia, Vitamin B, plastic jewelry bags in the desk, and trash bags in the garage, perhaps containing marijuana odor and some seeds. While the police noted the trash bags at the scene, they were not part of the evidence seized or adduced, were not tested, and the narcotics dog did not alert to this uncorroborated observation. The dog did alert, however, to a sealed and locked safe. The safe and contents were immediately seized and taken into police custody. Later, a warrant was obtained and the safe opened. The contents of the safe produced $145,000 cash and $14,000 U.S. Savings Bonds. This cash and the bonds I call items 4 and 5, for the sake of a proper sufficiency review, and to examine the mixed jury findings.

The State brought an action to forfeit all the previously seized money *and bonds*. A jury awarded the government the contents of the Crown Royal bag and safe, which included items 1, ($18,000 cash) and 4 ($145,000 cash). However, the jury did not find items 2 ($1304), 3 ($1220.78) and 5 ($14,000 in bonds) to be contraband. In other words, Mares prevailed on these three items seized. Inexplicably, the trial court refused to order the return of the U.S. Savings Bonds. By omission, the majority affirms this abrogation of the jury verdict. For this and other reasons recited, I would reverse and render the judgment below.

Requisites for Forfeiture

The majority correctly recites forfeiture requisites. While the majority gives begrudging lip service to the dual inference rule, it does not properly apply the rule either in its legal sufficiency or factual sufficiency analysis. Mere circumstantial evidence evoking equally plausible but opposite inferences is speculative and hence legally insufficient to support a finding. *Wal-Mart v. Gonzalez*, 968 S.W.2d 934, 936 (Tex.1998); *$56,700 in U.S. Currency v. State*, 730 S.W.2d 659, 661 (Tex.1987). The application of this principle is the primary point of departure between the majority and the dissent. Neither, however, does the majority demonstrate: 1.) A substantial connection between the bonds and cash and a felony drug deal; 2.) Probable cause for seizure; or 3.) That is more probable that innocuous items of jewelry bags, vitamins, video or cash were intended or used in a felony drug transaction.

The Dual Inference Rule and Forfeiture Requirements

In 1987, a divided Texas Supreme Court considered our issues. The court materially noted the purpose of forfeiture laws was to facilitate forfeiture of assets used by drug dealers. *$56,700, 730* S.W.2d at 661. The court mandated in forfeiture proceedings the State show probable cause for seizing a person's property. *Id.* The court held the Texas Constitution requires a reasonable belief that "a substantial connection exists between the property to be forfeited and the criminal activity defined by the statute." *Id.* (internal citations omitted); Tex. Const. art. I, §9. Indeed, not only in the Section 9 search and seizure area

(Fourth Amendment of U.S. Constitution) but also every seizure must, per force, involve the Constitutional dimension of due process of law under both the Fifth and Fourteenth Amendments of the U.S. Constitution. *United States v. James Daniel Good Real Property,* 510 U.S. 43, 52, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993); see also Tex. Const. art. I, §19. "Here the Government seized property not to preserve evidence of wrongdoing, but to assert ownership and control over the property itself. Our cases establish that government action of this consequence must comply with the Due Process Clauses of the Fifth and Fourteenth Amendments" *James Daniel Good,* 510 U.S. at 52, 114 S.Ct. 492. Additionally, the Eighth Amendment "excessive fines" clause of the U.S. Constitution may also be implicated when there exists disproportionality between the forfeiture and the gravity of the offense.[2] *United States v. Bajakajian,* 524 U.S. 321, 334-35, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998). In *$56,700,* the court also correctly held "meager circumstantial evidence giving rise to inferences which are equally consistent with the proposition" or when circumstances are consistent with either of two facts with nothing showing one is more probable "neither fact can be inferred." *Id.* at 662. Though certainly it is not necessary in the criminal or civil context to eliminate "every reasonable hypothesis," logic, truth, law and morality all demand a hypothesis of equal or greater probability be eliminated. The U.S. Court of Appeals for the Fifth Circuit still states: "... we must reverse a conviction if the evidence construed

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[2] Here there exists at most proof of 0.001 ounces of cocaine yet $145,000 plus $14,000 in bonds are seized from a home, without prior notice or hearing. No such constitutional challenge was raised here.

in favor of the verdict 'gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charge.' " *U.S. v. Sultan,* 115 F.3d 321, 325 (5th Cir.1997) (internal citation omitted).

There is a problem with the overly broad concept that "direct and circumstantial evidence are equally probative." *Hankins v. State,* 646 S.W.2d 191, 199 (Tex.Crim.App.1981). Not necessarily. The application depends quintessentially on the *probabilities* of the circumstantial evidence inference construct. It would be better said that both types of evidence *may* be equally probative to expressly allow for the logical problem of equivocal or equal inferences. When a fact finder can make an arbitrary choice between equally probably but unproved conclusions, the finding would be based not on evidence but in part on mere speculation and conjecture; in such a case *the burden of proof would be shifted to the defendant to disprove* the act. *Western Tel. Corp. of Texas v. McCann,* 128 Tex. 582, 99 S.W.2d 895, 898-99 (1937) (emphasis added). If the 1987 supreme court went awry in the application of the law to the facts, it was still correct in the statement of these time-honored principles. *$56,700* is still good law both for its vital constitutional observations and its proper treatment of conflicting circumstantial evidence. We likewise noted these principles in *$9,050 v. State,* 874 S.W.2d 158, 162 (Tex. App.--Houston [14th Dist.] 1994, writ denied).

These views seemed to be shared by our current supreme court. The law still requires probable cause defined as a reasonable belief that a "substantial connection" exists between the property forfeited and the criminal activity defined.

State v. $11,014, 820 S.W.2d 783, 784 (Tex. 1991). As Justice Hecht noted by dissent in *Lozano v. Lozano,* 44 Tex. Sup.Ct. J. 499, 52S.W.3d 141, —, 2000 WL 33216152, at * 8-9 (Tex. March 8, 2001), the high court reached opposite *results* in *$56,700* and *$11,014.* In *$11,014,* a 19-year Houston police veteran with special training and experience in drug courier profiling, observed a very nervous passenger deplanning from a known drug route. While following the suspect, the transient continued to scan the airport, looking back and forth. When approached by the officer, the suspect had no ticket, testified to be common conduct of drug dealers designed to conceal their identity. The transient was traveling under an assumed name, was Jamaican, but lacked proper immigration papers, had a large bundle of cash in his pockets, and more in his suitcase, wrapped in rubber bands and bed sheets. Expert testimony showed marijuana was smuggled out of Houston wrapped in bed sheets. Only three or four garments were in the suitcase. A certified dog also alerted to both the suitcase and the money. Expert testimony indicated *recent* close proximity to a controlled substance. But a careful reader will notice the conflicting circumstantial evidence rule is neither raised nor discussed. Instead the brief *per curiam* opinion cites the lesser rule that any ultimate fact may be proved by circumstantial evidence. *Id.* at 785 *(citing Farley v. M.M. Cattle Co.,* 529 S.W.2d 751, 755 (Tex. 1975)).

Notwithstanding, when proof in commercial, personal injury and tort cases are in question, the quantum of circumstantial evidence necessary to have "some evidence" is more than 0.001 ounces of a substance or equally possible inferences. In this context of money damages for injuries, the

supreme court talks of circumstantial evidence in terms of "probability" not "possibility." *Wal-Mart Stores, Inc. v. Gonzalez,* 968 S.W.2d 934, 936 (Tex. 1998). *Transport Ins. Co. v. Faircloth,* 898 S.W.2d 269, 278 (Tex. 1995). In *Wal-Mart,* the court boldly reiterates "meager circumstantial evidence from which equally plausible but opposite inferences may be drawn is speculative and thus legally insufficient to support a finding." *Id.* (citations omitted.) For context, *Wal-Mart* is a slip and fall case and the question of knowledge by Wal Mart was the core issue. The cause of the injurious fall was macaroni. The suspect macaroni had mayonnaise in it, was fresh, wet, humid, contaminated with dirt, cart tracks and even had footprints defacing the food. Plaintiff's daughter opined it seemed to have been there a while. Justice Gonzales, however, more potently opined that dirt in macaroni salad on a heavily traveled aisle is no evidence how long it was there. *Id.* at 937. The evidence would support the opposite inference of quick contamination. Footprints support both an inference of fresh or ancient. *Id.* Opinion testimony that the macaroni "seemed like it had been there awhile" is "mere speculative, subjective opinion of no evidentiary value." *Id.* at 937-38. The plaintiff only proved a *possibility. Id.*[3]

Our supreme court had already held that "suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence." *Browning-Ferris, Inc. v. Reyna,* 865 S.W.2d

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[3] Were one to substitute "money" for macaroni, most could see by analogy that we not only do not know when the money was put in the safe or bag, but also we know not why, how, who or where the money came from. One could at least infer the macaroni came from the store. That the source of the money was felonious, is surmise emboldened by conjecture.

925, 927 (Tex.1993). Similarly, when relying on circumstantial evidence, the State must offer proof more that a mere surmise or suspicion regarding the source of the money. *$4,182 v. State*, 944 S.W.2d 24, 27 (Tex. App.--Texarkana 1997, no pet.).

While it is true that circumstantial evidence does not have to exclude every possible hypothesis, binding Texas precedent in civil circumstantial evidence cases requires for legal sufficiency: 1.) More than suspicion linked to other suspicions; 2.) Proof more than mere surmise or conjecture; 3.) Evidence that is more probable than not; and 4.) Meager circumstantial evidence that supports equally plausible but opposite conclusions is speculative (hence no evidence). Stated otherwise, "It is a rule of logic, as well as law, that when the existence of a fact does not make one possible inference more probable than another, no inference can be drawn at all." *Lozano*, 52 S.W.3d at —, 2000 WL 33216152, at *6 (Hecht, J., dissenting).

Legal Sufficiency

In determining a legal sufficiency challenge, we are to consider only the evidence that supports the trial court finding. *$11,014*, 820 S.W.2d at 785. Any ultimate fact may be proved by circumstantial evidence. *Farley*, 529 S.W.2d at 755. The State must offer proof more than a mere surmise or suspicion. *$4,182*, 944 S.W.2d at 27. Suspicion linked to other suspicion produces only more suspicion which is no evidence. *Browning-Ferris*, 865 S.W.2d at 927. Circumstantial evidence from which equally plausible inferences may be drawn is legally insufficient. *Wal-Mart*, 968 S.W.2d at 936; *$56,700*, 730 S.W.2d at 661. Did the State prove by legally

sufficient evidence a substantial link between the seized money/bonds and a drug related felony?

First, I note the jury did not find items 1, 2, and 5 to be contraband, ($1304, $1220.78 and $14,000 in U.S. Savings Bonds). Therefore, the trial court clearly erred by refusing to return the savings bonds to the appellant, Mares.[4]

The evidence relied upon by the government, shows the Mares residence was watched for six months during which no drug trafficking was evident. Deputy William Tipp's monitoring was itself based solely on a "tip." Not until Mares left the house with a Crown Royal bag accompanied by his 15-month-old boy did the police take action and stop him on a pretext basis. Deputy William Tipp arranged the stop through his son, Officer Bobby Tipp. The two traffic offenses[5] for which Mares was arrested were dismissed.[6]

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[4] Magnanimously, Mares was allowed to use some of his savings bonds for an appeal bond.

[5] Officer Bobby Tipps, HPD narcotics, testified he ordinarily did not give tickets and certainly did not arrest people for traffic tickets. However, on this particular occasion his father called him and ask him to make a traffic arrest (in the event of any traffic violation.) The arrest was made after this officer joined forces with Beddingfield and his brother, William Tipps.

[6] While one of the offenses that sent Mares to jail was arguable, changing lanes without a signal, the other action likely was not an offense. Mares moved his vehicle from northbound Loop 610 in Houston through the interchange with U.S. 290 and went from the far left lane into the far right lane and exited. Judicial notice of Interstate and United States highways would indicate that is often not only a lawful maneuver, but required in order to exit the freeway.

The Mares house had a outdoor video monitor which could be viewed on a television set. Officer Bart Beddingfield opined this video monitor was "kind of suspicious." His opinion suggested, this was only a modest $80,000 or $90,000 house. Mares carried a Crown Royal bag, (sometimes used by drug dealers, the same bag actually used to carry Crown Royal, marbles, sewing patches, and other lawful items). Vitamin B was found but Sgt. Juan Johnson said that though the vitamin "could" be used to cut cocaine, it was "not illegal." The strongest evidence by the government was the presence of 0.0018 grams (0.001 ounces)[7] of cocaine inside the safe. Officer Kim Downs, a firearms examiner and chemist, testified the total amount was so infinitesimal that it could not be weighed on a scale. He used a "UV test" which, thru a light process, determines minuscule microscopic amounts. The chemist also found a dirty cotton swab, presumably left by officers, that had the coloration of cocaine after a field test but this could not be chemically lab tested.[8] The safe was not

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[7] I note that 1 gram = 0.03 ounces. Patently, 1.8 mg = 0.0018 grams. Found by UV light was 1.8 mg which, for perspective, = .0018 grams or 0.001 ounces. One grain = 0.064799 grams. A grain is equivalent of a plump grain of wheat. So the light-measured quantity here is 0.0278 grains. This quantity is so *de minimus*, it cannot be seen or weighed by any traditional laboratory means. This is the quantum of proof, according to the majority, that makes vitamins, jewelry bags, cash and bonds all part of a sinister plot to deal drugs.

[8] I do not suggest drug enforcement officers planted cocaine, but merely observe that the safe was handled by many people, contents removed, and door left open by police. In the *Havner* context, this evidence would be summarily rejected as "no evidence." *See Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706 (Tex.1997). At the same time, growing scientific evidence points to the ubiquitous presence of cocaine. A 1993

tested by the chemist until after considerable handling by drug enforcement officers including the removal of $145,000 in cash and $14,000 in savings bonds. Contrary to the State's brief and argument, the firearms examiner/chemist testified it was not inconsistent or unreasonable to get 0.0018 grams of cocaine off $145,000 in circulated $100 and smaller bills. The expert's exact words were: "Correct. I would agree with that." Studies show that most U.S. denomination bills in circulation have traces of cocaine.[9] Kim went on to speculate in answer to the government's leading

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study by independent government laboratory Argonne National Laboratory indicated 78% of one-dollar bills in suburban Chicago were contaminated with cocaine. A single bill (1 of 278) had 1.05 milligrams of cocaine. Random samples in Miami and *Houston,* were *more contaminated* than Chicago. *See New Research may Help Bring Drug Dealers to Justice.* ARGONNE NEWS (April 7, 1997), *at* http:// www.anl.gov/OPA/local/news97/ an970407.html # story1. Still the majority seems to sleep well at night when all the cash involved in this case produced the grand total of 1.6 milligrams of cocaine-which can only be measured by UV light.

[9] The U.S. Court of Appeals for the Sixth Circuit, based on the high frequency of cocaine contaminated money, observes "evidence of a positive identification by a drug-sniffing dog may have minimal evidentiary value." *U.S. v. Buchanan,* 213 F.3d 302, 311 (6th Cir.2000). "We agree that this dog-sniff evidence was inherently unreliable and that the court abused its discretion in admitting it." *Id.* At 315. (Jones, J., concurring) (majority finding harmless error in overruling Fed. R. Evid. 403 objection.) Fort Worth Federal District Judge Belew notes the general contamination of U.S. currency. "There is some indication that residue from narcotics contaminates as much as 96% of U.S. currency currently in circulation." *U.S. v. $80,760,* 781 F. Supp. 462, 476 (N.D.Tex.1991), *aff'd,* 978 F.2d 709 (5th Cir.); *see also* Andy G. Rickman, *Currency Contamination and Drug Sniffing Canines: Should Any Evidentiary Value be Attached to a Dog's Alert on Cash?* 85 ky. L.J. 199 (1997). This article delineates many of the studies of currency contamination.

question that the microscopic cocaine "could have been there as a result of kilos being there." The gravamen of the government's case centers on a microscopic amount that cannot be seen or measured, that could innocently come from the bills themselves, or "could have been ... a result of kilos." Indeed, some of the bills in the safe and some in the Crown Royal bag had imbedded cocaine. There is no evidence of a past or future sale, receipt, manufacture or distribution of drugs.

There were some other opinions: garbage bags in the garage that "smelled" like marijuana but the trained and sophisticated narcotics officers didn't seize or bring as evidence, and that was undetected by the dog. There were small plastic jewelry bags in a desk drawer, also undetected by the dog. Then there is positive dog evidence: it alerted on the Crown Royal bag (containing $18,000) that tested an unmeasurable trace, the sealed safe, and two sacks in the automobile. Although the canine alerted to two sacks money with $1,220.78 and $1,304.00 respectively, the contents tested negative for narcotics.[10] The dog also alerted to a locked

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[10] Multiple errors of form and substance permeate this trial. First I note the prosecutor's unbridled use of the term "narcotic." *E.g.*, "This is a narcotics case." "This was a narcotics traffic stop." Repeating the word for as many as a hundred times, the government easily replaces proof with rhetoric. This type of "spin" in a trial should not, in my estimation, be tolerated. The only narcotics proven could be found on virtually all currency in circulation. Similarly, I note the prosecutor was allowed to commit the jury to virtually the exact fact situation during voir dire examination. The government was allowed, without special exceptions, to plead generally, entire chapters of the penal code simply by number and without substance or content. Thereafter, the *charge of the court was fundamentally flawed when it allowed confiscation without the requisite intent to manufacture/deliver or as proceeds of a felony.*

study door, but an undoubtedly thorough investigation and chemical analysis revealed nothing.

As the State correctly states in its brief, the required elements need prove that the contraband seized and sought to be forfeited was used or intended to be used in a drug related felony or was proceeds from such a felony. TEX. CODE CRIM. PROC. ANN. art. 59.02 (Vernon 2000). The proof simply does not support any possession with intent to deliver cocaine thus making TEX. HEALTH & SAFETY CODE ANN. §481.115 (Vernon 2000) inapplicable (mere possession of controlled substance). There was no useable or deliverable quantity of cocaine in Mares' possession. But in

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Specifically, the jury was allowed to confiscate the *money* for mere possession of any trace of *cocaine*. In the last sentence of the penultimate paragraph, the court deleted the statutory language "with intent to manufacture or deliver." Instead the trial court instructed on TEX. HEALTH & SAFETY CODE ANN. § 481.115 (Vernon 2000), a drug possession offense. *Drugs* were not seized. *Money/bonds* were seized. Thereafter the jury was simply asked if there was contraband, not whether the money was contraband. Of course, under the penal code possession cocaine can be contraband but is *not the contraband seized and forfeited.* The jury was so left to speculate and indeed concluded that cash without a microscopic trace of "contraband" would be returned but cash with either an unmeasurable trace or with 0.0018 grams was contraband to be confiscated! The confusing charge of the court, standing alone, explains this jury verdict. Over proper objection the trial court allowed evidence of a 1985 arrest for conspiracy. The defense was prohibited from completing its cross examination of the chemist Kim on equally plausible inferences by an erroneous government objection sustained by the court. While these myriad errors are not brought forth on appeal, they can explain the jury verdict on a basis other than evidence. And as we move into the 21st century, one would hope these types of fundamental errors would be diminished, not increased. Yet the insidious diminution of due process and liberty persists, unabated.

any event, the contest is not about the return, if possible, of 0.0018 grams of cocaine. Rather, the State's case must prove the *money/bonds* seized were proceeds from a cocaine sale or were to be used for the felony delivery or possession of cocaine. Here, the money and bonds were the contraband seized, not drugs. Sadly, the court's charge confuses the contraband money with cocaine and eliminated the requisite intent to deliver.[11] Nonetheless, we must concern ourselves with what *commercial undertaking violative of the Controlled Substances act occurred? $8,500 v. State*, 774 S.W.2d 788, 793 (Tex. App.–Houston [14th Dist.] 1989, no writ). There is no evidence, circumstantial or otherwise, to prove any substantial connection between the cash and the requisite felony offenses.

Some case illustrations of sufficiency of the evidence are instructive. In *$8,500*, this court found legal and factual sufficiency when the respondent drove the car to at least three meetings with undercover narcotics officers to discuss the *sale* of marijuana. The respondent "offered no explanation as to any other source of this large accumulation of cash." *Id.* In *Valles v. State*, 646 S.W.2d 636 (Tex. App.–Houston [1st Dist.] 1983, no writ), the respondent had seven ounces of heroin (felony amount), admitted to *dealing* heroin to support his family, was not working and showed officers ten $1,000 bills hidden under a chest of drawers. Perhaps the two closest fact scenarios to ours (excluding *$56,700*) are found in *$17,590* and *$2,067*. In the former, respondent Spurs was stopped on a non-pretext basis for a routine traffic violation. Legal sufficiency was based upon circumstantial evidence including a maroon bag with $17,590,

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[11] See footnote 10, above.

covered with a .44 magnum, the smell of marijuana plus marijuana debris throughout the vehicle, another .357 magnum, plus a ledger with symbols documenting *sales* of marijuana. The ledger balance was within $50 of the cash amount present in the bag and respondent admitted ownership of all. Respondent did testify the book was from his bar but expert testimony directly contradicted this. The nexus of the seized funds and felony commercial activity was shown by the proximity of the money, weapons, marijuana and ledger. *$17,590 v. State*, 850 S.W.2d 611, 614 (Tex. App.–Tyler 1993, writ denied). "[I]t is more reasonable than not that recovered money was derived from the sale of controlled substances." *Id.* Finally, there is a Crown Royal bag case which demonstrates insufficiency. A memo pad with wording "Inventory" "B 1/2 " and "G 1/2 " was found inside a Crown Royal bag with $1000. There was also present various pills and empty capsules. While the state argued this was drug inventory, the arresting officer lacked expertise and *could not connect the symbols to contraband. $2,067 v. State*, 745 S.W.2d 109 (Tex. App.–Ft. Worth 1988, no writ). Our case clearly does not fall within the legal sufficiency required by standing case law.

The proof attempts to weave a web of suspicion and prejudice into the fabric of legal sufficiency. The officer's testimony about the "possibility of a kilo," the "suspicious video," vitamins, plastic bags and 0.001 ounces, do not add up to $163,000 worth of past or future cocaine deals. No inference should be drawn from uncertain premises. *Missouri Pacific R. Co. v. Porter*, 73 Tex. 304, 11 S.W. 324 (Tex. 1889).

The Legal Sufficiency Dilemma

Under the circumstantial evidence rules enunciated in *$56,700, Browning-Ferris,* and *Wal-Mart, etc.,* the government, in order to survive a legal sufficiency challenge, would also have to eliminate or disprove the "equally plausible inference." This is alluded to by the majority. However, the majority does not apply the equal inference rule. Similarly, the majority eviscerates both this rule and the need for probabilities, not possibilities, by reviewing the evidence thru the myopic lens of the government. The rather abbreviated *per curiam* opinion essentially relied on by my colleagues, *$11,014,* does not actually address the circumstantial evidence rules recited above. Yet in this case, the defense has raised this precise issue repeatedly, from the trial, to the motion for new trial, and now before us. When the majority finally acknowledges the need for probabilities, they then ignore the rule in their factual review as well as their analysis. The trial judge candidly stated in open court he was not going to follow the Texas Supreme Court precedent of *$56,700.* If by that statement, he alluded to the supreme court's sometime disparate treatment of circumstantial evidence, such a position would be arguable. If, however, he meant he would not require constitutional level of proof, apply the "equally plausible inference" rule, or the "substantial connection rule," then I, but apparently not the majority, believe the respected jurist was truly mistaken.

An illustration of this equal inference problem can be shown by the officer's arrest of Mares. Was the officer himself guilty of civil malfeasance? 1.) His father (Officer William Tipps) asked him to

make a pretext stop (so he did what his father asked); 2.) Ordinarily he did not write tickets-wasn't even a traffic officer. (He violated his own principles for his father); 3.) He wrote two tickets for offenses that police and Houstonians commit every day, yet handcuffed, arrested and jailed Mares. Multiple squad cars and a canine "showed up" at the scene (this was no ordinary arrest and multiple officers knew in advance it would happen); 4.) The traffic tickets were dismissed (tickets are not ordinarily dismissed when an accused actually committed an offense). Is the drug enforcement officer arguably guilty of civil malfeasance of his office? Although a circumstantial case is there, I would answer no. No, because the logical inferences of possible malfeasance are equalized by the equally plausible inference he was honorably doing his duty. The majority, under its application of the law, would have to hold the officer was guilty of malfeasance.

I would, following *Wal-Mart, etc.*, observe the State's circumstantial hypothesis should be tested against the plausible legitimate possession of the money. *The State must show an illegitimate felony drug source of the money.* Inherent in the illegitimacy proof is the negating of legitimacy. For the source of the money cannot be both legitimate and illegitimate at the same time. Neither the government nor the majority explains away the $14,000 in U.S. Savings bonds. These bonds were in various dominations and in Mares' name. Do drug dealers exchange bonds with their names on them for cocaine? Yet all the circumstantial inferences should also tell us that the bonds were the result of a cocaine sale or prospective purchase. While possibilities abound, probabilities flounder. The State presented no evidence of a felony source

of any of the bonds or money. Assuming the laws of Texas afford an individual Texan the same protection as other defendants, then Mares' legal sufficiency challenge must be sustained.

Factual Sufficiency

The majority correctly recites the standard of review: We are to review all the evidence, not just evidence that supports the verdict. *Maritime,* 971 S.W.2d at 406-07. We set aside the verdict if it is so contrary to the overwhelming weight of evidence that it is clearly wrong and unjust; we do not assess credibility or substitute our judgment for the jury. *Id.* The key used to access the Mares' home was that of Ms. Jody French[12]. Ms. French resided with her young son at the residence on Malibu. Following the pretext stop, Ms. French's toddler was held by narc officers for over three hours. While holding her child, they obtained her consent to search the Malibu home. She correctly stated there were no drugs in the home.

The fact the Mares' Malibu house was watched for drug activity for six months without so much as a sniff, weighs heavily against the government. There is not a circumstantial inference but direct police observation negating drug dealing. The fact the government held Ms. French's 15-month-old child and threatened to turn the child over to CPS if she did not consent to a search, prompted an internal affairs investigation. This questionable holding of the toddler supports both positive and negative inferences, so I will draw none. No useable or marketable drugs were found in the

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[12] Notably, the "could have been a kilo" in the safe conjecture, could apply as well to Ms. French.

truck or house. There were no drugs on the plastic jewelry bags, in the locked study, on the vitamins, anywhere but some few contaminated bills. Mares gave plausible, typically probable, explanations of every circumstance advanced by the State. Mares was arrested near and on the way to his business where he used part of the cash in question. The dog alerted to clean money.[13] This is direct evidence that this dog alerts to clean money. The fact the dog did not alert where officers claimed they smelled marijuana and saw seeds directly questions their stated observations (although applying the equal inference rule, perhaps it was the dog whose nose was defective). The fact that no scientific evidence supports what officers claim they smelled and saw further erodes the stated opinions of certain officers.

It was undisputed Mares' father died and left an estate. Two witnesses and Mares testified Mares inherited and was paid family debts totaling more than $113,000 less than a year before. Mares sold a house and received further sums of cash. He ran two cash businesses, jewelry and auto repair. He just sold a motorcycle and was going to buy another, the stated source of the $1220.78 and $1304. In fact, his pretext stop was on the route and close to the jewelry business where he intended to go with his little boy. The government convinced the majority that a father going to work with his little boy and in possession of a Crown Royal bag of money, was instead (and more probably) going to do a drug deal. While there was some

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[13] Given that a dog's nose is as much as 100 times more sensitive than a human and the almost universal contamination of U.S. currency, I surmise the dog was correct and the lab incorrect.

impeachment evidence of both the government and defense witnesses, the facts remained that Mares had at least as legitimate reasons for the cash as the government's suggested illegitimate inferences.

Finally, the fact that drug enforcement officers interception and arrest of Mares with his 15-month-old, both on a direct route to his work, and near his legitimate business, lead to the probable inference that his intent and purpose were legitimate, not illegitimate. Mares just came from his home where officers testified they saw no drug transactions. There was not even a speculative opinion drugs were sold from his business. How can any rational reviewer support the rank conjecture Mares was taking his child and money to a drug deal?

That the U.S. Bonds in the safe had his name on the various denominations, likewise support the probable inference they were possessed or to be used legitimately. The possible inferences supporting the government's contentions are wholly insufficient to prove the requisite criminal animus.

If we are going to allow the government to hold our children, take our homes, our safes, use pretext stops and confiscate valuable items as proceeds of felony drug dealing, we must insist the State prove the valuables were not legitimately obtained. It is fundamental to our jurisprudence that government action be carefully and completely probed when it seizes a person or his property. The principle applies, *a fortiori,* when the government itself reaps a great financial benefit. Because of the constitutional implications in seizure and forfeiture cases of private property, the law should not apply

the lowest level of circumstantial conjecture but rather adhere to *strictissimi juris*. "The broad and wise policy of the law, formed in and descending to us through the crucibles of time, does not permit the citizen to be deprived of this property, his liberty, or his life upon mere surmise or suspicion, and places upon a trained judiciary the grave responsibility of determining as a question of law whether the testimony establishes more." *Joske v. Irvine*, 91 Tex. 574, 44 S.W. 1059, 1062 (1898)

I would sustain both the legal and factual sufficiency challenges. Today, surmise, conjecture and possibilities have been elevated to probability and proof. Property, liberty and life comprise today's casualties.

Judgment rendered and Opinions filed April 5, 2001.
Panel consists of Justices Anderson, Edelman, and Wittig.
Publish.